

**Fair Political Practices Commission**  
**MEMORANDUM**

**To:** Chairman Randolph, Commissioners Blair, Downey, Karlan and Knox

**From:** Galena West, Counsel, Legal Division  
Stephanie Dougherty, Executive Fellow  
Luisa Menchaca, General Counsel

**Date:** May 28, 2004

**Subject:** Pre-notice Discussion of Amendments to Required Recordkeeping for  
Chapter 4 – Regulation 18401 and Disclosure of the Making and Receipt  
of Contributions – Regulation 18421.1

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**I. Executive Summary**

In recent years, changes in technology have provided candidates and committees with the ability to receive contributions via credit card, debit account, and other similar electronic means. In response, the regulated community has sought advice regarding the permissibility of electronic contributions and a determination of the types of records which must be maintained for these contributions. Staff has advised that electronic contributions are allowed under the Political Reform Act (the “Act”)<sup>1</sup> and are “received” when authorized by the contributor. However, interviews with several treasurers<sup>2</sup> indicated that the regulated community follows a different time line for determining when an electronic contribution is “received.” In addition, these interviews revealed that the types of records kept for electronic contributions vary within the regulated community.

In order to remedy these discrepancies, staff proposes amendments to regulations 18401 and 18421.1 which would establish recordkeeping and disclosure standards for electronic contributions. Regulation 18401, the required recordkeeping regulation, would be amended to outline which records must be retained for a contribution made through electronic means. (See Appendix A - Proposed Amendments to Regulation 18401.) Regulation 18421.1, which contains the standards for determining when a contribution is made or received, would be amended to provide a clear rule for determining when an electronic contribution has been “made” or “received.” (See Appendix B - Proposed Amendments to Regulation 18421.1.)

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<sup>1</sup> Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

<sup>2</sup> Four current and past treasurers were interviewed. The treasurers represented a cross-sampling of treasurers for candidates, ballot measure committees, and political action committees.

## II. Background

### A. Current Advice

As technology has emerged to support the making and receipt of contributions via electronic means, candidates and committees have sought advice regarding the permissibility of electronic contributions. These requests have primarily questioned whether, and under what circumstances, a committee may receive electronic contributions and what records should be kept. In general, staff has advised that electronic contributions are allowed under the Act and emphasized the importance of timely and accurate disclosure of all contributions. Staff advice has also reminded candidates and committees of the importance of maintaining detailed records and the source documentation needed to prepare campaign statements and comply with the recordkeeping provisions of the Act.

Most guidance provided by the Commission has been through advice letters and the campaign manuals. For instance, in 1978, Commission staff determined in the *Schwartz* Advice Letter, No. A-78-193 that the Act would not prohibit fund-raising through credit card contributions given over the telephone, as long as the operation was run in compliance with the rules of the Act. In 2000, Commission staff addressed the issue of contributions made via the Internet. (*Bergeron* Advice Letter, No. I-00-089.) Staff advised that contributions could be made via the Internet, “as long as the Act’s disclosure and recordkeeping requirements” were met, including all information regarding each contributor and all detailed records and source documentation needed to comply with the provisions of the Act.<sup>3</sup>

Commission staff provided a summary of current advice regarding electronic contributions in a recent 2003 advice letter. (*McAndrews* Advice Letter, No. A-03-197.) The letter reaffirmed the policy that contributions made by credit card, whether via the Internet or over the telephone, are permissible under the Act, provided that the Act’s disclosure and recordkeeping requirements are met. This advice letter clarified several points related to electronic contributions, including the standard for when an electronic contribution is “received.”<sup>4</sup> The letter concluded that an electronic contribution is “received” on the date the transaction is authorized by the contributor, not the date the committee actually receives the monetary contribution.<sup>5</sup> This standard is also reflected in

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<sup>3</sup> In this case, the Internet provider was also determined to be an intermediary since it took control of the funds before deposit and made a lump sum payment to the committee. (*Ibid.*)

<sup>4</sup> Additional points related to electronic contributions include:

- Section 84306 requires that all contributions received by a person acting as an agent of a candidate or committee be reported “promptly” to the candidate or committee.
- When contributions are transmitted to the committee by an intermediary, the committee must keep records of and disclose information about the intermediary.
- Credit card receipts, vouchers, and other documentation meet the requirements of section 84300, providing that all contributions over \$100 must be made in the form of a “written instrument.”

<sup>5</sup> By point of comparison, the Federal Election Commission (FEC) generally considers a credit card contribution “received” on the date that the contributor authorizes the contribution. FEC advisory opinion letters, however, have advised that an electronic contribution made via the Internet is “received” on the date the committee **receives notice** that the contributor has confirmed the transaction, and a contribution that is

the January 2004, version of the campaign disclosure manuals. (Campaign Disclosure Manual 1 – Information for State Candidates, Their Controlled Committees, and Primarily Formed Committees for State Candidates, pages 2-3 and 3-1, and Campaign Disclosure Manual 2 - Information for Local Candidates, Superior Court Judges, Their Controlled Committees, and Primarily Formed Committees for Local Candidates, pages 1-4 and 2-1.)

## **B. Treasurer Interviews**

In April 2004, staff met with four treasurers to gather information about current procedures for receiving and reporting electronic contributions. Interviewees represented a cross-sampling of treasurers for candidates, ballot measure committees, and political action committees. Each treasurer was asked to describe their basic processes for receiving, accepting, returning, and reporting both electronic contributions and contributions made via check. The following summarizes the key findings of these discussions.

Electronic contributions can be made through a variety of mechanisms (on-line, over the telephone, contributor card, etc.). Matching some of the scenarios presented in advice letters, the treasurers described several mechanisms by which a contributor may transmit an electronic contribution to a candidate or committee. Electronic contributions may be made using an Internet service, such as PayPal, or a committee-sponsored website which allows contributors to enter contribution information (name, contribution amount, credit card number, etc.) and authorizes the transaction entirely on-line. These Internet contributions are typically processed overnight and may be deposited into the committee's bank account without any intervention by the treasurer.

The treasurers also explained that electronic contributions may be taken over the telephone. A designated committee representative collects contribution information and then processes the contribution (entering the information into a credit card terminal or on-line form). The transaction is typically processed overnight and then deposited into the committee's bank account.

Other electronic contributions are made via paper contributor card. A contributor completes a form with the required information and then mails, delivers, or otherwise transmits it to the committee.<sup>6</sup> The committee processes the contribution in the same manner as electronic contributions received over the telephone.

The treasurers were also asked to identify the date on which they would report an electronic contribution as "received." The treasurers considered all electronic contributions, whether made via the Internet, telephone or contributor card, to be "received" on the date the committee processed the transaction (i.e., the date that the credit card was charged or the account debited). These responses appear to be based on

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pre-authorized by a contributor and then periodically collected is "received" when the contributor's credit card is charged or the account is debited. In addition, a contribution made over the telephone is received on the date the funds are received by the committee.

<sup>6</sup> This would also include contributor cards which are faxed to the committee.

regulation 18421.1, which states that a contribution is “‘received’ on the date that the candidate or committee, or the agent of the candidate or committee, obtains possession or control of the check or other negotiable instrument by which the contribution is made.” However, these standards are inconsistent with past Commission advice. As noted above, staff has advised that electronic contributions are “received” on the date the transaction is authorized by the contributor, not the date the account is charged or debited. This discrepancy highlights the need for regulatory language which clearly establishes when an electronic contribution is “received.”

Treasurers also explained that complying with the disclosure and recordkeeping provisions of the Act requires additional source documentation for electronic contributions. Unlike contributions made via check, electronic contributions do not create a “paper trail” of cancelled checks or other documentation on a transaction. Although not explicitly required by the current language of regulation 18401, treasurers mentioned using several documents to track and report electronic contributions. The source documents mentioned by the treasurers included: authorization numbers for individual transactions, batch transaction numbers, batch transaction reports (which itemize a lump deposit into a committee’s account), and print-outs of on-line contribution forms.

Overall, these interviews reinforced the need for regulatory language which clarifies the date on which an electronic contribution is considered “received,” as well as which source documents must be retained in order to comply with the reporting and recordkeeping requirements of the Act.

### **III. Current Rules and Regulations**

Section 82015 of the Act defines “contribution” as follows:

“(a) ‘Contribution’ means a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received, unless it is clear from the surrounding circumstances that it is not made for political purposes.

“(b)(1) A payment made at the behest of a committee as defined in subdivision (a) of Section 82013 is a contribution to the committee unless full and adequate consideration is received from the committee for making the payment.

“(2) A payment made at the behest of a candidate is a contribution to the candidate unless the criteria in either subparagraph (A) or (B) are satisfied:

“(A) Full and adequate consideration is received from the

candidate.

“(B) It is clear from the surrounding circumstances that the payment was made for purposes unrelated to his or her candidacy for elective office.”

While the Act requires disclosure and recordkeeping with respect to contributions, it gives very little guidance on the manner in which contributions may be made. (Section 84200 et seq; section 84101.) Key direction is provided in section 84300, which prohibits the making or receipt of contributions of \$100 or more in cash. As discussed earlier, candidates and committees may collect contributions over the Internet, as long as the Act’s disclosure and recordkeeping requirements are met.

The Act requires committees to file periodic reports disclosing contributions received and expenditures made for the purpose of supporting or opposing state and local candidates and ballot measures. Section 84211 requires that a committee disclose the following information for each person who contributes a cumulative amount of \$100 or more:

1. The name and address of the contributor;
2. If the contributor is an individual, the contributor’s occupation and the name of his or her employer or, if self-employed, the name of his or her business;
3. The date and amount received from the contributor during the period covered by the report;
4. The cumulative amount received from the contributor since January 1 of the current calendar year; and
5. If the contributor is a committee, the identification number assigned to the committee by the Secretary of State.

In addition, section 84211(d) requires committees to disclose the total amount of contributions received from persons who have given a cumulative amount of less than \$100. In support of these disclosure requirements, section 84104 of the Act contains recordkeeping requirements:

“It shall be the duty of each candidate, treasurer and elected officer to maintain such detailed accounts, records, bills and receipts that are necessary to prepare campaign statements and to comply with the provisions of this chapter. The detailed accounts, records, bills and receipts that are maintained shall be retained by the filer for a period specified by the Commission ... .”

Regulation 18401 sets forth the detailed information and original source documentation that committees must maintain for contributions.

a. Contributions under \$25: Candidates, treasurers and elected officers must maintain records which contain a continuous computation of account balances, including a list of the dates and daily totals of contributions received under \$25. The original source documentation for these contributions consists of bank statements, check registers, bank or passbooks, and any other records reflecting a continuous computation of campaign account balances. (Regulation 18401(a)(1).)

b. Contributions of \$25 or more but less than \$100: In addition to the information required for contributions under \$25, for contributions of \$25 or more but less than \$100, candidates, treasurers and elected officers must keep records of the date of each contribution, the amount, and the full name and street address of the contributor. The records must also contain the cumulative amount received from the contributor and specify whether the contribution is monetary or nonmonetary.

The original source documentation for these contributions includes those items discussed above, and copies of contributor checks, cashier's checks, money orders, wire transfers, deposit or duplicate deposit slips, and any other documents reflecting all items deposited and all deposits made to any campaign account. Source documentation includes contributor cards, letters of transmittal and notices received from contributors. (Regulation 18401(a)(2).)

c. Contributions of \$100 or more: For these contributions, candidates, treasurers and elected officers must maintain all the information required for contributions above \$25, but less than \$100, and in addition, must include the occupation and employer of any contributor (or if the contributor is self-employed, the name of the principal place of business of the contributor).<sup>7</sup>

The original source documentation includes all items listed above for smaller contributions, and in addition, all communications sent by the committee to obtain the occupation and employer information. (Regulation 18401(a)(3).)

The Commission is able to add to these requirements in order to fulfill the disclosure purposes of the Act. With regard to electronic contributions, these proposed amendments fulfill the purposes of the Act to ensure that all:

“Receipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited.” (Section 81002(a).)

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<sup>7</sup> Section 85700 requires that a contribution of \$100 or more must be returned if the candidate or committee does not have in its records, within 60 days of receipt of the contribution, the name, address, and, if applicable, the occupation and employer of the contributor.

#### **IV. Discussion and Proposed Regulatory Action**

The amendments proposed for regulations 18401 and 18421.1 address electronic contributions and provide guidance to the regulated committee as to when an electronic contribution is “made” or “received” and what records must be kept to satisfy the requirements of the Act. Staff recommends that the Commission notice for adoption the proposed changes as follows:

##### **A. Proposed Amendments to Regulation 18401**

As stated above, regulation 18401 outlines the records required to be maintained and kept in order to comply with the recordkeeping rules of Chapter 4 of the Act. This regulation separates categories of required documents by the amount of the contribution or expenditure. As the disclosure requirements increase with the amount of a contribution or expenditure, so do the recordkeeping requirements in regulation 18401.

The proposed amendments to regulation 18401 add language to subdivision (a)(2)(B) which encompass all electronic payment methods which may be used to make an electronic contribution, and which specify the required original source documentation for electronic contributions of \$25 or more.<sup>8</sup> The amended language contains a new category including any wire transfers, credit card or debit account transactions, or “similar electronic payment option[s].” This category of transactions includes those contributions made via the Internet or telephone and attempts to encompass all electronic methods which can be used to make an electronic contribution. This list provides specific examples for ease of application but also provides a catch-all phrase of “similar electronic payment option” to include any other electronic payment method not listed.

The original source documentation required for these electronic contributions will include, specifically, any credit card receipts, transactions slips, credit card vouchers and any writing signed by the contributor. In addition, general language has also been included to mandate retention of any “other documentation of credit card transactions, including credit card confirmation numbers and itemized transaction reports, as well as any other information collected when debiting the contributor’s account.” This category of records was purposefully left broad to capture any additional information regarding electronic contributions.

As identified in advice letters and interviews with treasurers, the technology for websites, payment methods and authorization practices is constantly in flux. Limiting the recordkeeping of regulation 18401 to specific terminology of current technology and processes could create the need for constant revision. In the alternative, the language cannot be so broad that it is indecipherable or of little use to the regulated public. Staff believes that a compromise between the general and the specific has been reached with this regulation’s amended language and that of regulation 18421.1, discussed below. The specific examples of electronic contributions and source documentation provide guidance as to which records must be kept, while the general catch-all categories provide a

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<sup>8</sup> These requirements will also be applicable to contributions of \$100 or more since each subdivision incorporates the requirements of the previous subdivision.

safeguard when addressing differing methods of payment and accounting. Staff recommends that the amended language of regulation 18401 be noticed for adoption at the August Commission meeting.

## **B. Proposed Amendments to Regulation 18421.1**

Regulation 18421.1 states the rules for determining when a contribution is “made” or “received” for the purposes of the campaign disclosure provisions of the Act. For checks, the “contribution is ‘made’ on the date that the contribution is mailed, delivered, or otherwise transmitted to the candidate or committee.” (Regulation 18421.1(a).)<sup>9</sup> A check “contribution is ‘received’ on the date that the candidate or committee, or the agent of the candidate or committee, obtains possession or control of the check....” (Regulation 18421.1(c).) Although the rules for making and receiving monetary contributions in the form of a check or similar payment method are clear, no regulatory language currently exists which identifies when an electronic contribution, such as a credit card contribution made via the Internet, is considered made or received. In addition to the changes discussed below, the proposed regulatory language clarifies when an electronic contribution is “made.”

Current guidance from advice letters and the campaign manuals, as discussed above, states that an electronic contribution is “received” when the contributor authorizes it. For example, when a contributor calls to give credit card information over the telephone, the contribution is “received” at the time of authorization. This is the same as when a contributor fills out an on-line contribution form and sends the information; the contribution has been “received” by the committee at that time. In the first example, the committee has possession or control of the contribution but in the second, it may not have knowledge of the contribution. This application of our current advice regarding Internet transactions does not use possession or control by the committee in Internet transactions, but the authorization of the contributor as the standard. This standard may cause reporting violations for a committee who has by definition “received” an electronic contribution because the contributor has authorized it, but may not know about or open the information until a later time.

During the late contribution reporting periods, committees have a reporting time line of only 24 hours from the time the contribution is received; and only 24 hours in which to return a late contribution not cashed, negotiated, or deposited. (Section 84203(b) and (c).) Contributions need not be reported nor shall be deemed “accepted” if not cashed, negotiated, or deposited, but returned before the closing date of the campaign statement on which they would be reportable. (Section 84211(q).) For purposes of the Proposition 34 contribution limits, contributions accepted in excess of the contribution limits must be returned prior to deposit or negotiation within 14 days of receipt. (Regulation 18531(b).) All of these time lines suggest that a committee must act quickly when returning an

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<sup>9</sup> In addition, the date of the check may be used in lieu of the date on which the contribution is mailed, delivered, or otherwise transmitted, provided it is no later than the date the contribution is mailed, delivered, or otherwise transmitted. (Regulation 18421.1(a).) A late contribution is “made” on the date the contribution is mailed, delivered, etc. (Regulation 18421.1(b).)



unwanted contribution, to comply with disclosure requirements and to avoid a violation of the contribution limits. If the standard is not based on the behavior and actions of the committee, then these time lines are even shorter and perhaps impossible in situations such as the returning of a contribution received during the late contribution reporting period.

As discussed above, the current definition of “received” is not the same standard used by the interviewed treasurers. The treasurers report an electronic contribution as “received” when the contributor’s credit or debit account is charged. This standard suggests that treasurers have applied the rules for checks to their reporting of electronic contributions, resulting in a standard based on when the committee has possession or control of the funds.

A standard based on possession or control of the funds is similar to how regulation 18421.1 determines when a contribution through payroll deduction or membership dues is deemed to be “received.” These contributions are “received” on whichever of the following is earlier: the date “the committee obtains actual possession or control of the contribution” or “[w]ithin 60 days after the receipt of the payment by the committee’s sponsor.” (Regulation 18421.1(d).) This standard of allowing receipt to be 60 days after the sponsor’s receipt of the funds is feasible for payroll deductions since the committees already have contributor information for their members and have few concerns of receiving a contribution in excess of the limits, since contribution amounts are predetermined. Unfortunately, this same standard cannot be applied to all electronic contributions since they do not share these same characteristics or safeguards. Applying a standard based on possession or control of the funds alone could allow for the manipulation of reporting time periods, as discussed in detail below.

For consistency with the existing rules for non-electronic contributions, the amended language for receiving an electronic contribution is also based on “possession or control.” Non-electronic contributions, as well as the payroll deductions described above, all apply the rule of possession or control.<sup>10</sup> For checks and the like, the standard for receiving a contribution is possession or control of the check itself. For payroll deductions, the standard applies to possession or control of the contribution funds. In the proposed regulatory language at subdivision (e), an electronic contribution (defined to mimic the description in regulation 18401, as discussed earlier) would be “received,”

“[O]n the date the candidate or committee obtains possession or control of the debit/credit account information or other payment information by which the contribution is made, or on the date the candidate or committee obtains possession or control of the funds, whichever is earlier.”

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<sup>10</sup> Additionally, the regulation also uses the standard of possession or control for determining when nonmonetary contributions are made or received. (Proposed regulation 18421.1(f).)

This standard of possession or control of either the payment information or the funds would address the variety of methods by which an electronic contribution may be made. Examples of these rules include:

- If a contributor telephoned a contribution into a committee, the committee would “receive” the contribution on the date the contributor gives his or her debit/credit account information to the committee. This is similar to a check contribution that a committee “receives” when the contributor hands the check over to a committee.
- However, if a contributor makes his or her contribution via the Internet, the date the committee receives the contribution would depend on the method used by the committee.
  - (1) If the committee reviews the on-line transaction before the processing of the contribution, then the committee “receives” the contribution upon opening the payment information.
  - (2) If the committee allows electronic contributions to be deposited directly into its bank account without any intervening review, then the contribution is “received” when the committee has possession or control of the funds, not the payment information.

In order to address all of these situations, the proposed regulatory language includes two standards and “whichever is earlier” language to determine when an electronic contribution is received. It is critical that both of these standards – possession or control of the funds and possession or control of the payment information – be applied in concert. If, for example, an electronic contribution is only considered “received” upon receipt of the payment information, those committees with automatic deposit of electronic contributions via the Internet may delay their review of payment notifications and arguably suspend reporting. Although already in the committees’ accounts and available for spending, committees may interpret the language of the regulation to permit this. However, this purposeful delay in reporting would be a violation of the Act and would cause the Commission staff additional time and effort to create a public awareness of that fact.

In order to avoid this confusion, staff recommends that the Commission clarify the definition of what it means to receive an electronic contribution by adopting the “whichever is earlier of the two standards” approach as proposed.<sup>11</sup> Current advice (linking receipt of a contribution to contributor authorization) would resolve this issue but would also raise the other problems discussed above. The proposed amendment to regulation 18421.1 addresses this concern by applying the two standards for possession or control and “whichever is earlier” language. As previously discussed, this is the same principle used for payroll deductions and membership dues which also has an “earlier of the following” qualifier. Thus, under no scenario would the date of “receipt” be deemed

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<sup>11</sup> The reverse is also true if the standard only reflected when the funds were deposited since a committee would know exactly how much they had to spend by reading the contributor information. The committee could then spend that amount on credit without depositing the funds to cover those expenses until later; therefore, delaying the reporting of that contribution.

to be later than the date that the candidate or committee actually gained possession or control of the funds.

For these reasons, staff recommends that the amended language of regulation 18421.1 be noticed for adoption at the August Commission meeting.

### **V. Recommendations**

Staff recommends that the Commission approve the proposed amendments to regulations 18401 and 18421.1 for notice for adoption at the August Commission meeting to provide guidance and clear rules for the recordkeeping and disclosure of electronic contributions.

#### **Attachments:**

Appendix A – Proposed Amendments to Regulation 18401

Appendix B – Proposed Amendments to Regulation 18421.1